IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

MONDAY, THE 10TH SEPTEMBER 2007 / 19TH BHADRA 1929

LA.App..No. 131 of 2002()

LAR.71/1999 of PRL.SUB COURT, KOZHIKODE
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APPELLANT: CLAIMANTS A TO D: IN LAR.NO.71/1999:
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1. MANGALOLI UNICHIRAKUTTY,
MANGALOLI HOUSE, VANGERI AMSOM DESOM,
KOZHIKODE TALUK, KOZHIKODE DISTRICT.

2. KUNHIMALU, -DO- -DO-.

3. DEVAKY, -DO- -DO-.

4. PARAMESWARAN, -DO- -DO-.

BY ADV. SRI.P.S.SREEDHARAN PILLAI
SRI.P.R.SREEJITH

RESPONDENTS: CLAIMANT F & RESPONDENT IN LAR.NO.71/1999:
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1. MADAMBATH KRISHNAN, S/O. GOPALAN,
MALIKKADAVU, KOZHIKODE DISTRICT.

2. THE SPECIAL TAHSILDAR (LA), NH-1,
KOZHIKODE.

BY ADV. SRI.C. CHANDRASEKHARAN FOR R1
GOVT. PLEADER SMT. R. BINDU FOR R2

THIS LAND ACQUISITION APPEAL HAVING BEEN FINALLY HEARD ON 10/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.N.Krishnan, J.

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L.A.A.No.131 of 2002

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Dated this the 10th day of September, 2007.

JUDGMENT

Question to be considered is whether there is any merit in this appeal. The contentions of the petitioners-claimants 1 to 5 are to the effect that the property acquired belongs to them exclusively and F claimant, namely, Krishnan has no right over the property and even if there is any right, it is barred by ouster.

2. There is no dispute between the parties that the property acquired is the property as per the partition deed of the year 1960, whereby the property along with the other properties were set apart to the share of 17 persons jointly. Two such persons namely, Ammalu and Velayudhan, who were the children of Unichira, assigned their right in favour of F claimant, namely, Krishnan, as per document No.1759 of 1963. Therefore, the sixth claimant claims right over this property to the extent to 2 out of 17 shares. It is also come out in evidence that a suit for

partition was filed and that has been dismissed for default. There is no question of res judicata because the right to claim partition is a continuing cause of auction. The court below found that the evidence is let in to show that the property had been purchased by F claimant from the above two persons in 1963. The court below also in paragraph 10 dealt with the evidence tendered to arrive at that conclusion.

3. So, the principal point to be considered is regarding the fact whether the right of F claimant is barred by ouster. It is the settled principle of law that all co-owners need not separately pay tax and even the non-participation in rents and profits for some point of time will not militate against their right. In the decision reported in **Krishnan** v. **Raman** - 1986 K.L.T. page 63 S.N. 104 the guidelines to be followed in deciding the question of ouster has been laid down by this Court. This Court held that it may not be always possible for each and every co-owner to be in physical possession of co-ownership property. Some of them or one of them alone may be in actual physical possession and others may be sharing rents and profits from him or them. Sometimes sharing of rents and profits itself may not be there and some of

them or one of them alone may be appropriating the income without sharing the same with others. In all these cases law presumes that the co-owner or co-owners in actual possession is or are so in possession not for himself or themselves alone but on behalf of other co-owners also. The possession of one or some of the co-owners is considered by law always to be on behalf and as representatives of the other co-owners also. The court further held that the classical requirement of adverse possession is that it should be nec vi nec claim nec precario, i.e., possession required must be adequate in continuity in publicity and in extent to show that it is possession adverse to the rival claimant. Ouster must be made out. Further it is held that ouster is a positive matter involving action with a hostile animus and not mere inaction. So, until and unless these ingredients are established to prove ouster, the right of a co-owner cannot be defeated.

4. From the materials available before the court below, there is nothing to show that these ingredients have been satisfied and claimants 1 to 5 has been holding the properties with a hostile animus adverse to the interest of F claimant,

namely, Krishnan. Therefore, I find that the court below was perfectly justified in holding that F claimant was entitled to 2 out of 17 shares in the property by virtue of the purchase made by him in 1963 document.

Therefore, appeal lacks merit and it is dismissed.

M.N.Krishnan,
Judge.

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